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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 134

A/S J. LUDWIG MOWINCKELS REDERI, ET AL.,
Appellants,

vs.

ISBRANDTSEN CO., INC., ET AL.,

No. 135

FEDERAL MARITIME BOARD,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

On May 17, 1951, the District Court granted the Federal Maritime Board (intervenor) and defendant steamship carriers permission to appeal to the Supreme Court of the

United States from an order of said court dated March 21, 1951. Judgment thereon was entered on April 5, 1951. This motion to dismiss or affirm on the ground that the questions presented by such appeal are so unsubstantial as not to need further argument is made pursuant to Paragraph 3 of Rule 12 and Paragraph 4 of Rule 7 of the Rules of the Supreme Court of the United States.

Preliminary Statement

Plaintiff-appellee (Isbrandtsen) is a common carrier by water in the foreign commerce of the United States between United States North Atlantic ports and ports of Europe. Defendants are two groups of steamship carriers known as Conferences organized under Section 15 of the Shipping Act (46 U.S.C. Sec. 814). One Conference operates eastbound; the other westbound. The Conferences adopt uniform rates and practices which are binding on their member lines. Plaintiff is not a member of either Conference, but is in competition with both in the North Atlantic trade. The Federal Maritime Board administers the Shipping Act as successor to the Shipping Board, the Shipping Board Bureau of the Department of Commerce and the United States Maritime Commission.

On January 2, 1948 and August 24, 1948, the U. S. Maritime Commission, *without notice or hearing,* issued its orders approving U. S. Maritime Commission Agreements Nos. 4490-6 and 7920-1, purporting to authorize these two shipping conferences in the North Atlantic trade, among other things, to employ the contract/non-contract exclusive patronage dual rate system. Under this system, the Conferences establish, for precisely the same transportation service, two rate schedules, one of which is higher than the other by a substantial amount and is charged to those shippers who refuse to contract in advance to patronize the defendant Conference lines exclusively.

Pursuant to the approved Conference Agreements, the defendant steamship lines, through their Conferences, announced that effective November 1, 1948, they would require all shippers to contract to employ Conference lines exclusively on pain of being charged 20 percent higher tariffs if they failed so to contract. Once having contracted, any shipper who breached by shipping goods via an independent non-Conference line—such as Isbrandtsen —would be required to pay to the Conference a penalty equal to twice the amount of freight that would have been payable to a Conference line under the contract in respect of the shipment constituting the violation, and the shipper would thereafter be denied the lower contract rates.

Immediately upon receiving notice from shippers that they were being solicited to sign exclusive patronage contracts and that after November 1, 1948 they would be unable to continue to patronize Isbrandtsen Company, Inc., in the future as an independent American Flag carrier, Isbrandtsen instituted an action in the United States District Court pursuant to the provisions of the Shipping Act (46 U.S.C. Sec. 30), the Urgent Deficiencies Act of 1913 (28 U.S.C. Secs. 2284, 2321-25) and the Administrative Procedure Act (5 U.S.C. Sec. 1009), to enjoin, set aside, annul and suspend orders and approvals of the U. S. Maritime Commission dated January 2, 1948, approving Conference Agreement No. 4490-6 and August 24, 1948, approving Conference Agreement No. 7920-1.

This suit before a three-judge statutory court was based on the ground that such Commission orders and approvals purported to authorize the defendant steamship lines concertedly to coerce shippers in the North Atlantic trade to patronize defendant steamship lines exclusively and to retaliate, in violation of the Shipping Act of 1916, against shippers in such trade who patronize plaintiff.

Because the Commission had approved the Conference Agreements without notice or hearing, the District Court concluded that it should not finally pass on the validity of the challenged Agreements until the Commission had had an opportunity to consider this question in an adversary proceeding. However, the Court also found that "were the defendant carriers to institute an exclusive patronage system pending the Commission's decision upon such proceeding, the plaintiff would be gravely prejudiced". Therefore, in view of the fact that the Commission lacked power to prevent the carriers from inflicting irreparable injury upon the plaintiff pursuant to the approved Agreements, the District Court, in order to preserve the *status quo* pending further Commission proceedings, temporarily suspended the Conference Agreements and temporarily enjoined defendant Conferences and carriers from effectuating and threatening to institute the exclusive patronage system. The opinion of the District Court on the prayer for a temporary injunction is reported at 81 F. Supp. 544 (1949).

The defendant carriers appealed the order issuing the temporary injunction to this Court, which dismissed the appeal on April 4, 1949 (336 U.S. 941).

In the meantime, on February 1, 1949, Isbrandtsen filed its complaint with the Maritime Commission, pursuant to the direction of the District Court in issuing the temporary injunction. After extensive hearings before the Commission's Examiner, resulting in a transcript of 1400 pages, exclusive of exhibits, the Examiner filed his Recommended Decision on October 5, 1949. This first Recommended Decision made no findings of fact, denominated as such, as requested by Isbrandtsen, but confined itself to a discussion of the lawfulness *per se* of the exclusive patronage contract system under Section 14(3) of the Shipping Act (46 U.S.C.

Sec. 812(3)). On the latter point, the Examiner concluded that "the contract system is not unlawful *per se*, and that it is within the administrative discretion of the Commission, when supported by substantial evidence, to determine in each case whether the system violates one or more sections of the Act". The Examiner, therefore, recommended that Isbrandtsen's complaint be dismissed.

Presumably because of the failure of the Examiner's original Recommended Decision to supply a solid basis of fact upon which the Commission could determine, by substantial evidence, whether the use of the exclusive patronage system in the North Atlantic trade was violative of any sections of the Shipping Act, the Commission, after oral argument, entered an order remanding the case to the Examiner for further Findings of Fact. *Upon the petition of Isbrandtsen,* the scope of remand was enlarged by the following supplemental order of the Commission:

> Ordered that the record herein be and it is hereby remanded to Examiner C. W. Robinson.
>
> A. With instructions to prepare, serve, and file proposed *findings of fact* supplemental to his recommended decision served October 5, 1949, as to whether the exclusive patronage contract system proposed to be instituted by respondents, and the forms of exclusive contracts to be employed therewith, (1) are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or (2) operate to the detriment of the commerce of the United States, or (3) are in violation of the provisions of the Shipping Act, 1916, and particularly whether they constitute a resort to other discriminative or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason: (Italic supplied).

B. *With instructions to rule upon the proposed findings of fact and conclusions of law submitted by the Complainant* . . . (Italic supplied).

The Examiner's Recommended Supplemental Decision made the following specific findings of fact requested by Isbrandtsen:

"10. On or about October 1, 1948, respondent Conferences sent notices to all known shippers in the North Atlantic trade that effective November 1, 1948, the exclusive patronage contract rate system would be inaugurated simultaneously in both East and Westbound carriage...

• • • • • • •

"13. The notices sent to the trade on October 1, 1948 by respondent Conferences informed shippers that the proposed contract rates would on and after November 1, 1948 be available only to those shippers who should sign a contract whereby the shipper agreed for the period from November 1, 1948 to December 31, 1948 to effect all his transportation requirements by means of respondent Conferences' lines exclusively.

"14. Shippers were informed that failure to sign such a contract would entail application to their shipments by respondents' lines after November 1, 1948 of non-contract rates which were fixed by means of an *arbitrary differential* at a level 20% to 30% higher than the currently existing scale." (Italic supplied).

Before the Commission could pass upon the Recommended Supplemental Decision of the Examiner, the Commission was abolished. Final argument was had before its successor, the Federal Maritime Board, and the Board entered its order dismissing the complaint on December 1, 1950. In its report the Board found that the dual-rate system purported to be authorized in the Agreements was not unjustly discriminatory or unfair, does not operate to

the detriment of the commerce of the United States, and was not in violation of the Shipping Act.

Isbrandtsen thereupon filed in the District Court an amended complaint which also challenged the Board's order of December 1, dismissing its complaint before the Board, as well as the earlier orders of the Commission dated January 2, 1948 and August 24, 1948, which authorized the Conference Agreements.

The Secretary of Agriculture intervened in support of Isbrandtsen.

The United States, through the Antitrust Division of the Department of Justice, answered the amended complaint and confessed error in the Maritime Board's order.

The case was heard on motions to dismiss Isbrandtsen's amended complaint filed by defendant carriers and the Maritime Board. On March 20, 1951, the three-judge District Court denied these motions to dismiss and ordered that a permanent injunction should issue.

Decision Below

In the court below, Isbrandtsen contended that the Commission's authorizations of the Conference Agreements were absolutely null and void because they exceeded the authority conferred on the Commission by the statute. These authorizations were issued pursuant to Section 15 of the Shipping Act (46 U.S.C. Sec. 814) under which the Commission is authorized to approve and immunize, to a limited extent, under the anti-trust laws, conferences of shipping lines. The Section provides that "The Commission may by order disapprove, cancel, modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds . . . to be in violation of this chapter and shall approve all other agreements, modifications, or cancellations".

Section 14 of the Shipping Act (46 U.S.C. Sec. 812), however, provides, in part, that "No common carrier by water shall directly or indirectly, in respect to the transportation by water of passengers or property between a port of a state, territory, district, or possession of the United States and any other such port, or a port of a foreign country . . . Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

Isbrandtsen's position below, that the authorizations of the Commission were null and void, was based on (a) the fact that the contract-non-contract system explicitly, on its face, retaliates and discriminates against a shipper who patronizes a non-Conference carrier and (b) the fact that the Shipping Act explicitly, on its face, forbids any carrier to "retaliate against any shipper . . . or resort to other discriminating or unfair methods, because *such shipper has patronized any other carrier or for any other reason.*" (Italics supplied.)

However, the District Court disposed of the case without reaching the contention advanced by Isbrandtsen that the Board lacked any authority whatsoever to approve a contract/non-contract exclusive patronage dual-rate system.

The Court agreed with the Board that such Conference Agreements must not be approved if the Board finds they are "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports" (Sec. 14). Starting from this premise, the Court then adverted to the Examiner's Finding that the dual-rate system established an "arbitrary differential" in rates applicable to the same transportation service. Reviewing the record, the Court

found that the Examiner's Finding that the dual-rate system was arbitrary was not only supported by substantial evidence, but was, indeed, required by the only evidence in the record on the point.

Laying the Examiner's Finding alongside the statutory proscription, the Court found that the Examiner's Finding that the dual-rate system was "arbitrary" was precisely tantamount to a holding that it was unjustly discriminatory and unfair. The Court then noted that the Board, while adopting its Examiner's specific finding of "basic" fact—that the dual-rate system was "arbitrary"—had itself arrived at a completely inconsistent conclusion of "ultimate" fact to the effect that the dual-rate system was not unjustly discriminatory or unfair. This latter conclusion of ultimate fact, the Court found, was not only lacking of any support in the record but was so utterly inconsistent with the basic fact, found by the Examiner and adopted by the Board, that it could not stand.

The Court below summarized its holding in the following language:

> "The conference carriers, acting pursuant to the dual-rate provisions, proposed to put into effect contract and non-contract rates with a spread between the two, which spread the Board found to be arbitrary. We decide that the dual-rate provisions, since they permit an arbitrary spread, are invalid. Our order will therefore provide that the Board's order be set aside and that the defendants be enjoined from acting pursuant to the dual-rate provisions."

Question Presented

Where the Maritime Board found as a basic fact that, for identical transportation services, shippers refusing to sign exclusive contracts were subjected by the dual-rate system to substantially higher rates established by means

of an arbitrary differential, could the Board validly conclude that such dual-rate system was not unjustly discriminatory or unfair.

The Question Present Is So Unsubstantial as to Require No Further Argument

The decision of the court below is a conventional application of the principles governing judicial review of administrative action, particularly as those principles have been clarified by enactment of the Administrative Procedure Act (5 U.S.C. Sec. 1001, *et seq.*) and this Court's recent interpretation thereof in *Universal Camera Corp.* v. *N.L.R.B.*, 70 S. Ct. 456 (1951). The Court below found, as indeed it was required to do, that the Board's principal conclusion of ultimate fact was not only contrary to the evidence in the record, but was actually contrary to the only specific finding of fact on the issue made by the Board or its Examiner.

As indicated above, in the only specific finding on the issue, the Board's Examiner, pursuant to specific instructions from the Board to pass upon the Findings of Fact tendered by Isbrandtsen, found that the non-contract rates were established by means of an arbitrary differential. Indeed, a contrary finding could hardly have been made, not only because of the admissions of defendant carriers on the record, but also because the dual-rate system is arbitrary and unreasonable on its face. In the teeth of this finding by the Examiner, the Board purported to find the ultimate fact, in statutory language, that the Conference Agreements established a dual-rate system which "is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports."

Such a preliminary finding the Board was required to make under the congressional mandate embodied in Sec-

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tion 15 of the Shipping Act. However, its finding that the dual-rate system was "not unjustly discriminatory or unfair" in this instance was manifestly inconsistent with its Examiner's finding that the dual-rate system was constructed by means of an arbitrary differential which bore no relation to differences in transportation conditions. The Board's conclusion of ultimate fact could scarcely stand, not only because unsupported in the record, but because it was squarely contradicted by the only specific finding of fact on the issue.

This Court's opinion in the recent *Universal Camera* case, *supra*, contains a lucid exposition of the change enacted by the Administrative Procedure Act in the standard to be applied to judicial review of administrative cases. Emphasis there was placed on the importance of the Trial Examiner's findings as an integral part of the record which must be examined in searching for substantial evidence.

The principle, however, applied by the Court below in this case, in rejecting as unreasonable the inconsistent finding of ultimate fact by the Board, has long been recognized. In the language of this Court, "an ultimate finding [is] not enough * * * in the absence of a basic finding to support it * * *" *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 533; see also, *Florida* v. *United States*, 282 U. S. 194. The only basic finding in the record on the point involved here was that of the Examiner. Instead of supporting the Board's ultimate finding, this basic finding was completely inconsistent with it. An ultimate conclusion squarely contradicted by a specific finding of fact which is supported by the evidence is obviously invalid. Any other view would, as the Court below indicated, reduce the administrative process to utter irrationality.

Furthermore, the Court below found that the Examiner's finding of basic fact was adopted by the Board as its own. Section 8(b) of the Administrative Procedure Act confers upon interested parties the right to submit for consideration proposed findings of fact, and requires that the ruling on each shall be part of the record, and the Board's own rules of practice incorporate this requirement (46 C. F. R. 201). Apparently in compliance with these provisions, the Board, in remanding the matter to the Examiner, specifically ordered him to rule on Isbrandtsen's proposed findings and conclusions.

The only finding pertinent to the issue in the record, as required by the Administrative Procedure Act, the Board's Rules of Practice, and the Board's Order of Remand, was the basic finding required by the evidence, specifically made by the Examiner, and adopted by the Board. No ultimate conclusion by the Board inconsistent with that basic finding could possibly stand if the administrative process is to possess the integrity which the Administrative Procedure Act sought to assure it.

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Conclusion

For the reasons stated, the single question presented by this appeal is unsubstantial and no useful purpose can be served by further argument in this cause. Plaintiff-appellee therefore respectfully moves this Honorable Court to dismiss this appeal or to affirm the judgment of the District Court herein.

Respectfully submitted,

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